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No. 94-69

In The
Supreme Court of the United States

October Term, 1994

Sunkist Growers, Inc.,
Petitioner,
vs.
Del Monte Corporation
and
Nabisco Brands, Inc.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

Lee J. Weinstein
*Wayne M. Smith
Graham & James
801 South Figueroa Street
Suite 1400
Los Angeles, CA 90071
(213) 624-2500

Attorneys for Petitioner
Sunkist Growers, Inc.

*Counsel of Record

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STATUTE

9 U.S.C. §10 1,2

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Respondents[1] arguments merely serve to underscore the reasons why this Court should grant the petition.

On the first question presented for review, Respondents advance an interpretation of the question presented for review so narrow as to reduce it to an absurdity. Respondents argue that the question presented is not "in controversy" because, although the courts have admittedly varied widely in their treatment of the conduct of party-appointed arbitrators under the FAA, none have expressly rejected the application of the "evident partiality" standard of 9 U.S.C. §10. While this argument is little more than transparent sophistry, and precisely the opposite of what Del Monte argued before the Eleventh Circuit, it nonetheless underscores the very conflict raised by the Petition.

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[1] Sometimes referred to collectively herein as "Del Monte."

Respondents' assertion that the second question presented for review is also not "in controversy" is similarly flawed in that it rests on a tortured interpretation of the Eleventh Circuit's opinion. The Eleventh Circuit's opinion (otherwise no model of clarity), however, could not be more explicit in its holding on the second question -- broadly stating that Sunkist was equitably estopped from resisting arbitration of any claim that even "presumes the existence of . . . an agreement [containing an arbitration clause]," regardless of whether such claim sounds in contract or tort. 10 F.3d at 758. It is *precisely* this holding which is raised by the Petition.

I. The Court Should Grant The Petition To Resolve The Question Of Whether The "Evident Partiality" Standard Of Section 10 Of The FAA Applies To Party-Appointed Arbitrators

Del Monte argues that the question of whether the "evident partiality" standard of Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, applies to party-appointed arbitrators was not "in controversy" either in the case below, or in the other cases which have grappled with the issue. Del Monte is wrong on both counts.

Del Monte's position that the Eleventh Circuit applied the "evident partiality" standard to the conduct of its party-appointed arbitrator is premised on a carefully edited quotation from the Eleventh Circuit's opinion in the case.[2] Del Monte asserts:

> [T]he Court stated that the issue was whether "the conduct of Jesse Meyers, the party-designated arbitrator chosen by Del Monte, was sufficiently inappropriate to constitute evident partiality and prejudicial misconduct in violation of 9 U.S.C. §10(a)(2) and (a)(3) of the Federal Arbitration

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[2] Finding little support for its contentions in the Eleventh Circuit's opinion in this case, Del Monte is reduced to relying on the district court's opinion in many respects. (*See, e.g.*, Opposition at 11: "The *courts* below applied the 'evident partiality' standard of 9 U.S.C. § 10(b) to Del Monte' appointed arbitrator.")

> Act, 9 U.S.C. § 1, et seq.," and concluded that it was not."

(Opposition at 12) This could hardly be more misleading. Del Monte has omitted the first three words of the quotation -- "Sunkist contends that" -- which make it clear that all the Court was doing was stating Sunkist's characterization of the issue, not adopting that characterization as its own.

In fact, the Eleventh Circuit *never* applied the evident partiality standard to the conduct of Del Monte's arbitrator, Jesse Meyers, and certainly did not, as Del Monte intimates, find that his conduct was appropriate under that standard. Rather, the court rejected the two Eleventh Circuit cases cited by Sunkist which described the application of the evident partiality standard to arbitrators,[3] stating that "the case sub-judice involves the conduct of a party-appointed arbitrator, which is easily distinguished from the above cited cases." 10 F.3d at 759. Thereafter, the court analyzed Meyers' conduct *solely* by reference to authorities holding that party-appointed arbitrators are expected to be "partisan."[4] Indeed, this is exactly what Del Monte had urged the court to do.

While it now acknowledges the line of authority cited by Sunkist holding that the "evident partiality" standard applies to party-appointed arbitrators, Del Monte denies the existence of the contrary line which holds that the FAA permits party-appointed arbitrators to be "partial." (Opposition at 15) Yet, Del Monte argued the exact opposite before the Eleventh Circuit, asserting that "the vast majority of federal courts have been careful to distinguish the roles of party-appointed arbitrators, and to recognize that *party-appointed arbitrators are expected to be partial.*"[5] In support of

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[3] *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982); *Lozano v. Maryland Casualty Company*, 850 F.2d 1470 (11th Cir. 1988).

[4] 10 F.3d at 759, *quoting, Lozano, supra,* 850 F.2d at 1472.

[5] Brief of Appellees Del Monte Corporation and Nabisco Brands, Inc., filed May 1, 1992 at p. 31 (emphasis supplied). Having prevailed in the Eleventh Circuit, Del Monte has tamed its rhetoric in its Opposition to the Petition, urging only hat "party-appointed arbitrators will not be strictly neutral." (Opposition at 16)

this statement, Del Monte cited to the Eleventh Circuit's decision in *Lozano*, a decision it now derides because it did "not even arise under the Federal Arbitration act . . . at all." (Opposition at 15) Del Monte has substantially shifted ground since the Eleventh Circuit's opinion issued. The cases it previously touted as holding that "party-appointed arbitrators are expected to be partial" have been suddenly transformed into cases which subject party-appointed arbitrators to the "evident partiality" standard.

In the same vein, Del Monte cites to *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962) and *Metropolitan Property & Cas. V. J.C. Penney Cas.*, 780 F. Supp. 885, 891 (D. Conn. 1991), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (table) as decisions which "squarely apply § 10(a)(2) and its 'evident partiality' standard to party-appointed arbitrators." (Opposition at 15-[illegible]) Yet, both of these decisions expressly hold that party-appointed arbitrators are entitled to be "partisans."[6] Del Monte cannot, so does not, explain how an arbitrator could possibly be "partisan," but at the same time not be "partial."[7] In fact, before the Eleventh Circuit Del Monte equated these terms when it cited *Stef* as among those decisions holding that party-appointed arbitrators are "expected to be *partial*"[8] -- a position it succeeded in having the Eleventh Circuit adopt, but from which it now attempts to distance itself on this Petition.

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[6] *Stef, supra*, 209 F. Supp. at 253 ("[party-appointed arbitrators] are partisans once removed from the actual controversy"); *Metropolitan Property, supra*, 780 F. Supp. at 891 ("party selected arbitrators are not expected to be 'neutral' . . . Partisan he may be, but not dishonest").

[7] Del Monte's assertion that there is no conflict among the courts is further belied by decisions that have recognized the very conflict underlying the first question presented for review here. For example, in *Standard Tankers, Etc. v. Motor Tank Vessel, AKTI*, 438 F. Supp. 153, 158-59 (E.D.N.C. 1977), the court held that the decision *Stef* (ostensibly decided under the FAA) conflicted with the "evident partiality" standard under the FAA by permitting party-appointed arbitrators to be "partisans." *Id.* at 159.

[8] Brief of Appellees Del Monte Corporation and Nabisco Brands, Inc., filed May 1, 1992 at p. 31-32 (emphasis supplied).

Del Monte's final argument is that the Eleventh Circuit properly applied the AAA's standard of "good faith and with integrity and fairness." But the Eleventh Circuit's treatment of this standard (which it never attempted to interpret) simply underscores the underlying decisional conflict. In purporting to apply the AAA standard, the Eleventh Circuit relied on those authorities allowing party-appointed arbitrators to be "partisans," while rejecting cases holding party-appointed arbitrators to the "evident partiality" standard. Thus, the Eleventh Circuit's attempted application of the AAA Rules did nothing more than lead to the very conflict raised by the Petition.

II. The Court Should Grant The Petition To Resolve The Question Of Whether Under The Doctrine Of Equitable Estoppel Arbitration Can Be Compelled On Any Claim Which "Presumes The Existence" Of An Agreement Containing An Arbitration Clause

Del Monte also asserts that the question of whether under the doctrine of equitable estoppel a party is required to arbitrate any claim which "presumes the existence" of an agreement containing an arbitration clause was not "in controversy" before the Eleventh Circuit. (Opposition at 12-13) Yet, this was precisely the holding of the court below. 10 F.3d at 758. Del Monte acknowledges as much in its attempt to defend this holding at pages 28-29 of its Opposition.

Del Monte's opposition on this point is little more than a rehash of the Eleventh Circuit's confusing and contradictory opinion. Seeking to justify the use of equitable estoppel in arbitration, Del Monte asserts that the doctrine "prevent[s] a party from trying to impose the obligations of a contract on a non-signatory while simultaneously denying that non-signatory the benefits of the contract's arbitration clause." (Opposition a 26) The Eleventh Circuit's opinion, however, goes much farther than this as it requires arbitration of any claim which even "presumes the existence" of a contract containing an arbitration clause. 10 F.3d at 758. There are clearly many claims which, while "presum[ing] the existence" of a contract, do not attempt to

"impose the obligations of a contract." A good example of one is Sunkist's claim for tortious interference, which sought redress for Del Monte's prevention of SSD's performance of the contract. While this claim indisputably "presumed the existence" of a contract, it certainly did not attempt to impose the contract's obligations on Del Monte.

This unique application of what has been labeled as "equitable estoppel" in the arbitration context cannot be justified under any tradition application of the doctrine, or under the related doctrine of judicial estoppel. The element of reliance -- essential to both doctrines[9] -- is absent from the analysis. Del Monte attempts to sidestep this flaw by invoking what it describes as "the long established equitable precept that a party may not accept the benefits of a contract and at the same time reject its obligations." (Opposition at 26). But the cases which Del Monte cites for this proposition all refer to "obligations" owed to the other contracting party (thereby satisfying the reliance element), not to an interloper such as Del Monte to which no obligations were ever owed. Despite its efforts, Del Monte can cite to no authority outside the arbitration context which applies this type of "short form" estoppel.

Perhaps the most disturbing aspect of the Eleventh Circuit's broad arbitrability ruling is that it requires arbitration of all tort claims for interference with an agreement containing an arbitration provision. Del Monte is understandably hard put to explain how the principles of "justice and equity" it trumpets in support of this broad application of the estoppel doctrine are advanced by allowing a stranger to claim the benefits of a contract as a reward for interfering with its performance. (Opposition at 26) This anomaly in the application of the doctrine to issues of arbitrability is a direct consequence of the failure of the courts to require proof of all of the traditional equitable estoppel elements.

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[9] *Travelers Indem. Co. v. Swanson*, 662 F.2d 1098, 1101 (5th Cir. Sept. 1981) (equitable estoppel); *Eagle Found, Inc. v. Dole*, 813 F.2d 798, 810 (7th Cir. 1987) (judicial estoppel).

While Sunkist does not deny that equitable estoppel could be applied to require arbitration with a non-signatory under certain circumstances, those circumstances must involve something more than a claim which merely "presumes the existence" of a contract containing an arbitration clause. If the courts are to apply the doctrine of equitable estoppel in the arbitration context, and if that application is to make any sense, then it should be applied with all of its elements intact, consistent with other areas of the law.

III. Conclusion

In view of the foregoing, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

LES J. WEINSTEIN
* WAYNE M. SMITH
GRAHAM & JAMES
801 South Figueroa St.
Suite 1400
Los Angeles, CA 90071
(213) 624-2500

Attorneys for Petitioner
Sunkist Growers, Inc.

* *Counsel of Record*

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